

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-1363

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

LUIS GONZALEZ,

Defendant-Appellant.

On Appeal from the United States District
Court For the Southern District of New York

APPENDIX

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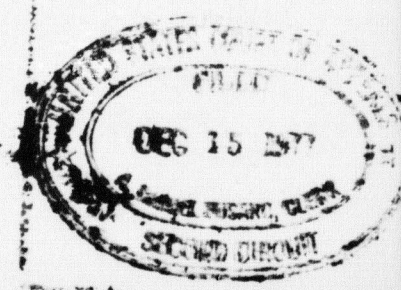


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PAGINATION AS IN ORIGINAL COPY

77-1363

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

LUIS GONZALEZ.

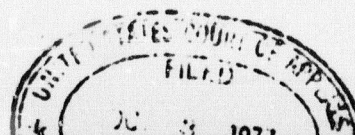
77 CR. 385

POLLACK, J.

S.D.N.Y.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

U.S.C.A. NO. 77-1363

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UNITED STATES OF AMERICA,

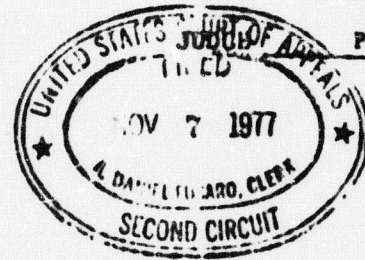
-VS-

LUIS GONZALEZ

U.S. DISTRICT COURT
SOUTHERN DISTRICT OF
NEW YORK

CASE NO. 77 Cr. 385

POLLACK



-----X
1ST SUPPLEMENTAL RECORD

INDEX TO THE SUPPLEMENTAL RECORD ON APPEAL

DOCUMENTS

Certified extract of docket entries

C

Transcript of record of proceedings
dated, July 13, 14, and August 22, 1977.

12

Clerk's certificate,

13

0208 1 0848

GONZALEZ, LUIS

05 20 77 033

U.S. TITLE SECTION
18:876OFFENSES CHARGED
Threat. communication by mail.

ORIGINAL COUNTS

8/52

H. KEY DATES & INTERVALS

ARREST or	INDICTMENT	ARRAIGNMENT	TRIAL
U.S. Custody Beg. in 5-26-77 Summons Served First Appearance	High Risk Date 5-20-77 Information ☐ Indict Waived ☐ Superceding ☐ In Charging District #	1st Plea 5-26-77 Final Plea	Trial Set For 7-13-77 Trial Began 7-13-77 Trial Ended 7-15-77

MAGISTRATE	CLERK	DEFENSE
Section Magistrate	Section Clerk	Section Defense
Section Magistrate	Section Clerk	Section Defense
Section Magistrate	Section Clerk	Section Defense

U.S. Attorney

ATTORNEYS

Gregory L. Diskant
791-1930

5-20-77

Filed indictment.

5-24-77

Filed Govt.'s. affidavit for a writ of habeas corpus directed to Warden, N.Y.C. Correctional Institution for Men. Writ Issued, ret., 5-26-77.

5-26-77

Deft. (no atty. present). Court directs deft. to Magistrate for assignment of counsel. Court directs a not guilty plea be entered. Bail fixed at \$1,000 cash or surety. (Deft. on writ). Writ adjourned sine die. Case assigned to Briant, J. for all purposes.....Owen, J.

6-15-77

Filed ORDER for Dr. Stanley L. Portnow to examine the deft. to determine whether he is unable to understand the proceedings against him. BRIANT, J.

6-17-77

Filed CJA 23 Financial Affidavit, and Order appointing counsel.

6-30-77

Pre-trial held. Trial date set for 7-11-77. Deft. remanded.

7-6-77

Deft w/o/p, Pre-trial Conference held, Trial date remains 7-11-77. BRIANT, J.

Case reassigned to Judge Pollack. m/n
BEFORE Judge Pollack: Jury Trial begun, (Interpreter).
Trial Cont'd. (Interpreter Maria Elena Cardonas Present, &
Richard Gchoen Present.) Jury Verdict. (5:35P.M.) Deft.,
found GUILTY as charged. Jury polled. Jury excused. All motions
of the deft., are denied. Pre-sentence report ordered. For sentence 8-22-77
at 9:45 A.M. ~~BY~~ Deft REMANDED to the custody of the U.S.
Marshal (G. Wolf Rptr)

3/22/77

Fld Notice of Appeal by dft from the jdgt. entered 8/22/77
to the U.S.C.A. . m/n

8/22/77

Leave to Appeal Informa Pauperis is granted . Pollack J.
Fld Judgment (atty Jack Lipson interpreter R Schoen)
3 yrs, impr. to run consecutively w/ any other sent. imposed.
POLLACK J. issued all copies.

A TRUE COPY
RAYMOND F. BURCHARDT, Clerk

By Bruce Lipson
Deputy Clerk

FINE AND RESTITUTION PAYMENTS

DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-vs-

LUIS GONZALEZ,

CASE NO. 77 Cr. 385

JUDGE POLLACK

EXTRACT OF DOCKET ENTRIES

DATE

PROCEEDINGS

11-7-77

Filed transcript of record of proceedings
dated, July 13, 14, and August 22, 1977.

77-1363
Supp
A TRUE COPY
RAYMOND E. BURCHARDT, CLERK
BY B. L. Garcia
Deputy Clerk

77 CRIM. 0385

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

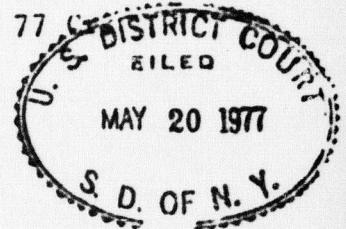
UNITED STATES OF AMERICA

-v-

LUIS GONZALEZ,

Defendant.

INDICTMENT



The Grand Jury charges:

On or about the 2d day of March, 1977, in the Southern District of New York and elsewhere, LUIS GONZALEZ, the defendant, unlawfully, wilfully and knowingly, did deposit in a post office and authorized depository for mail matter, to be sent and delivered by the Postal Service and did knowingly cause to be delivered by the Postal Service according to the direction thereon a communication, to wit, a letter addressed to "Judge Wienfield, U S Court Huse, Foley Square, New York 10007", containing a threat to kidnap Edward Weinfeld and a threat to injure the person of Edward Weinfeld.

(Title 18, United States Code, Section 876.)

Amos L. Davis
FOREMAN

Robert B. Fiske, Jr.
ROBERT B. FISKE, JR.
United States Attorney

MICROFILM

MAY 20 1977

2 the jury. Any spectators wishing to remain, will
3 have to remain until the completion of the Court's charge.

4 Marshal, please lock the doors.

5 THE COURT: Ladies and gentlemen, we have
6 reached the conclusion of a very, very short trial. I
7 shall now give you your final instructions which will
8 guide your deliberations.

9 It is your recollection of the facts
10 that counts here, not the recollection of attorneys,
11 not my recollection or any opinions other than your
12 own. It is for you to determine the weight that you
13 will give to the evidence, the credibility that you
14 will extend to the witnesses who testified and the
15 reasonable inferences that are to be drawn from the
16 evidence that has been received.

17 You must approach your duty with the
18 attitude of complete fairness and impartiality,
19 without the slightest trace of prejudice or sympathy
20 either for or against the government or the defendant.
21 Your decision as to the facts is final and conclusive.
22 The law you receive from me, and that will guide you
23 on the legal side.

24 It is essential in the performance of your
25 duties that as to anything that was ordered stricken

1 from the record you put it out of your mind and disregard
2 it. As I have indicated earlier, the indictment here
3 is but a formal method of accusing a person of a crime
4 and bringing the case into court for trial and
5 determination. It is not any evidence that a crime
6 has been committed and no inference of any kind
7 may be drawn from the fact that an indictment exists.
8 The Grand Jury which returned the indictment was not
9 asked to find out if the defendant was guilty. That is
10 solely your function.
11

12 The defendant before you has pleaded not
13 guilty. That places on the government the burden of
14 proving guilt beyond a reasonable doubt with respect to
15 the crime that the defendant is accused of having
16 committed. That burden never shifts. A defendant is under
17 no obligation to prove his innocence. Indeed, a
18 defendant doesn't have to submit any evidence at all.
19 On the contrary, under our law and under our system,
20 a defendant is presumed to be innocent of any charge
21 made against him in an indictment. That presumption
22 existed when the indictment was handed down and the
23 fact that a defendant does not take the stand under
24 the law creates no inference against him.

25 A defendant's presumption of innocence remains

1 throughout the trial and in your deliberations. It is
2 a presumption which is sufficient in itself to require
3 an acquittal of a defendant unless you, the jury,
4 on all the evidence, are convinced of his guilt beyond
5 a reasonable doubt.
6

7 A reasonable doubt is one that arises out
8 of the evidence in the case or the lack of evidence.
9 It is a doubt that is not merely shadowy. A reasonable
10 doubt is one that appeals to your reason, to your
11 judgment, to your common sense and to your experience.
12 It is not an excuse to avoid the performance of an
13 unpleasant duty. A reasonable doubt is such as would
14 cause prudent people to hesitate before acting
15 in matters of importance to themselves.

16 Putting that a little differently, if
17 you are confronted, as indeed you are here, with
18 an important decision and after reviewing all the
19 factors that are pertinent to that decision you find
20 yourself beset by an uncertainty and a measure of your
21 judgment, then you have a reasonable doubt.

22 Conversely, in that same situation, if
23 you have taken into account all the elements that pertain
24 to the problem and you find that you have no uncertainty
25 and no reservation about your judgment, then you have no

reasonable doubt.

Now, when we say there is a burden of proving something beyond a reasonable doubt we don't mean that you must find proof to a positive certainty or proof beyond all possible doubt. If those were the rules, few persons, however guilty, could ever be convicted.

Except where you have matters which from their nature could be resolved with mathematical certainty, it's practically impossible for a person to be absolutely and completely convinced of any fact. Consequently, the law does not make absolute certainty a test.

You are going to have to rely on your own good, sound common sense and general experience in evaluating the evidence. As I have frequently said to jurors, when you go into the jury box or into the jury room, you don't check your common sense and blind yourself to your ordinary judgment and common experience.

In evaluating the evidence which has been placed before you, you will determine the reliability of those witnesses that you have heard and the extent to which you can count on any or all of them for accurate accounts of the facts. You have had an opportunity

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to observe the witnesses as they testified. Consider how each witness impressed you. Did the witness appear to be truthful, candid, frank and forthright, or did the witness seem evasive or shifty or suspect or in any other way? Did the witness appear to know what he or she was talking about, and did the witness impress you as having a purpose to report his or her knowledge to you truthfully and accurately? Was the witness consistent or self-contradictory on material matters? How did the manner and matter of his direct testimony compare with the manner and matter of testimony testified on cross examination?

You should consider not only the intrinsic persuasiveness of each person's testimony by itself but its setting and circumstances of the whole case. For example, the degree to which any particular item of testimony is corroborated or contradicted by other evidence in the case and all such things you would test by your own mature judgment about life, about people and about human behavior.

A witness may be discredited or, as we say, impeached by contradictory evidence or by evidence he or she at other times made statements inconsistent with the testimony of the witness stand. You should consider,

2 among other things, the question of interest or
3 motive. The witnesses have identified their backgrounds
4 and associations. If you believe a witness has wilfully
5 sworn falsely before you, you are free either
6 to disregard all the testimony of that witness or to
7 accept and credit such parts as your judgment dictates
8 should be accepted.

9 There are generally speaking, two types of
10 evidence from which a jury may properly find the
11 truth in the facts of the case. One is direct evidence
12 such as the testimony of an eyewitness or a participant.
13 The other is indirect or what we call circumstantial
14 evidence which consists of proving a chain of
15 circumstances pointing to the existence or non-existence
16 of certain facts.

17 In order to prove a fact by circumstantial
18 evidence, there must be positive proof of some facts
19 which, though true, does not itself directly establish
20 the fact in dispute but does afford basis for a
21 reasonable inference of its existence. The fact or
22 facts upon which it is sought to base an inference must
23 be shown and not left to rest in conjecture, and when
24 shown it must appear that the inference drawn is the
25 only one that can fairly and reasonably be drawn from the

2 facts and that any other explanation is fairly and
3 reasonably excluded.

4 A common example I give to juries of
5 circumstantial evidence which will help you understand
6 circumstantial evidence is the following: Suppose when
7 you came into court this morning the sun was shining
8 and there were no clouds in the sky and when you came
9 into the trial court the blinds on the windows were down
10 so that you couldn't see outside, and pretty soon somebody
11 came through the door and walked into the courtroom
12 with a dripping umbrella and a dripping raincoat.
13 Since you had been in the jury room or the courtroom
14 all this time and hadn't been outside you couldn't tell
15 what occurred. When you left outside it was clear
16 but when these people came in with their dripping
17 umbrellas and raincoats something may have happened outside.
18 You would be entitled to infer from the circumstances
19 that there is a dripping umbrella and raincoat that it
20 is raining outside. Thus, circumstantially you infer
21 from the facts, the dripping raincoat and umbrella, some
22 other matter, that it is raining outside. The mind is
23 led circumstantially from the facts to reach another
24 fact. That will give you an illustration of what
25 circumstantial evidence is and what it may lead to.

It is not necessary that the participation or lack of participation of the defendant in any crime be shown by direct evidence. The connection may be inferred from such facts and circumstances as legitimately tend to sustain that inference.

You apply to all the evidence the same standard of proof. It must satisfy you of the guilt of the defendant beyond a reasonable doubt or else you must acquit the defendant.

This defendant was indicted under the federal law which I will read to you now. It is known as Title 18, United States Code, Section 876.

The indictment charges that the defendant violated Section 876, Title 18 of the United States Code by causing a threatening communication to be delivered.

The law provides:

"Whoever knowingly deposits in any Post Office or authorized depository for mail matter, to be sent or delivered by the Postal Service or knowingly causes to be delivered by the Postal Service according to the direction thereon any communication with or without a name or designating mark subscribed thereto, addressed to any other person and containing any threat

2 to injure the person of the addressee or of another," is
3 guilty of a criminal offense.

4 I will read to you the indictment, the
5 summons that brought the defendant to court.

6 "The Grand Jury charges on or about the
7 2nd day of March, 1977, in the Southern District of
8 New York, Luis Gonzalez, the defendant, unlawfully,
9 wilfully and knowingly did deposit in a Post Office and
10 authorized depository for mail matter to be sent and
11 delivered by the Postal Service and did knowingly
12 cause to be delivered by the Postal Service according
13 to the direction thereon a communication, to wit,
14 a letter addressed to Judge Weinfeld, U.S. Court House,
15 Foley Square, New York, 10007, containing a threat to
16 kidnap Edward Weinfeld and a threat to injure the
17 person of Edward Weinfeld."

18 Whether it contained a threat to kidnap
19 or contained a threat to injure, either is covered by the
20 indictment and both need not have been contained, either
21 would be sufficient to meet the indictment.

22 The elements, each of which the government
23 must establish beyond a reasonable doubt in order to
24 find the defendant guilty as charged in the indictment,
25 are as follows:

2 First, that on or about March 2, 1977, in
3 the Southern District of New York and elsewhere, the
4 defendant knowingly deposited a letter in an
5 authorized depository for mail and caused the letter
6 to be delivered by the Postal Service and such letter
7 was addressed to Judge Weinfeld, U.S. Court House,
8 Foley Square, New York, 10007.

9 Second, that the letter contained a
10 threat to injure Judge Weinfeld.

11 And third, that the defendant acted
12 knowingly, wilfully and unlawfully.

13 The first of these elements which the
14 government must establish, accordingly, is that on
15 or about March 2, 1977, the defendant knowingly and
16 intentionally deposited in a United States mail
17 depository or caused to be delivered by the Postal Service
18 a letter addressed to Judge Weinfeld. This element of
19 the offense is satisfied if you find either that the
20 defendant deposited the mail matter himself or took some
21 action without which the delivery of the letter would not
22 have occurred.

23 In other words, that the defendant intended
24 and knew that his acts would cause this letter to be
25 delivered to Judge Weinfeld.

2 In respect to the second of the elements
3 that I have mentioned, the government must prove
4 accordingly that the defendant intended to and
5 did communicate a threat of injury, one which could
6 reasonably induce apprehension of bodily harm. It
7 is the utterance which the statute makes criminal,
8 not the specific intent to carry out the threat. It is
9 not necessary for the government to prove that the
10 defendant had a specific intent or a present ability to
11 carry out this threat. It is the use of the mail for
12 the purpose of communicating a threat which is at the
13 base of the statute.

14 A person making a statement that one
15 would reasonably be understood as a threat of injury,
16 one which could reasonably induce apprehension of bodily
17 harm, is guilty of a violation of the statute as long as
18 that person intended to make the statement and knew the
19 meaning of the words used.

20 The threat must on its face and in the
21 circumstances in which it was made be so unequivocal,
22 unconditional and specific as to convey a gravity of
23 purpose and an apparent intent of execution.

24 All parts of the letter should be
25 considered in construing it, and each part should be

considered in the context of the whole in determining the meaning and purpose of the expressions contained therein.

Communications that execute merely expressions of ideas, information, opinion or even severe criticism are not punishable under this statute, consistent with the privilege of all of us of free speech under the First Amendment to the Constitution. Thus, if the communication was no more than the mere expression of ideas, information, opinion or severe criticism, the communication is protected by the freedom of speech preserved under the First Amendment.

Of course, if the communication is not a threat of injury and is merely made in jest, or is expressly conditional, it is not punishable under the statute. The letter involved here expressed several thoughts. You must decide whether within those thoughts was the expression of a threat to commit injury as I have defined it for you.

The third of the elements that I have... called to your attention, the element of unlawfully, wilfully and knowingly, requires that the government establish that the defendant voluntarily and intentionally deposited the letter or caused it to be delivered and that

1 he intentionally made threatening statements in the
2 letter that showed an apparent determination to carry
3 them into execution.
4

5 An act is done knowingly if it is
6 done voluntarily and purposely and not because of
7 mistake, accident, mere negligence or other innocent
8 reason.

9 A threat is knowingly made if the maker of
10 it comprehends the meaning of the words used by him.
11 An act is done wilfully if it is done wilfully and
12 intentionally. A threat is wilfully made if, in
13 addition to comprehending the meaning of his words, the
14 maker voluntarily and intentionally uses the
15 words.

16 Unlawfully means, contrary to law. It
17 is not necessary, however, that the defendant knew
18 the precise law he is charged with violating. In essence,
19 then, the phrase, "Knowingly, willfully and unlawfully,"
20 means in a deliberate and voluntary fashion as opposed
21 to mistakenly or accidentally.

22 Knowledge and intent exists in the mind.
23 Since it is not possible to look into a man's mind to
24 see what went on, the only way you have for arriving
25 at a decision on these questions is for you to take into

1
2 consideration all the facts and circumstances shown
3 by the evidence, including the exhibits, and to
4 determine from them all the facts and circumstances
5 whether the requisite knowledge and intent are
6 present at the time in question. Direct proof is
7 not necessary. Knowledge and intent may be inferred
8 from all the surrounding circumstances.

9 In our everyday affairs, we are
10 constantly called upon to decide from the actions of
11 others what their intentions are, what they mean.
12 Experience has taught us that frequently actions
13 speak louder than words and that the circumstances
14 surrounding an act or statement can give us an insight
15 as to the character of that act or that statement.

16 Now, under your oath as jurors you swear
17 to render a true verdict on the evidence. The duty of
18 imposing sentence rests exclusively upon a judge. Your
19 function is to weigh the evidence in the case and
20 determine the guilt or innocence of the defendant
21 solely on the basis of such evidence and the law. . . .

22 You cannot allow any consideration of the
23 punishment which might be inflicted upon a defendant if
24 convicted to influence your verdict in any way or in
25 any sense to enter into your deliberations. Were you to do

that, you would be trespassing on the function of the judge.

I want you to listen to each other carefully in the jury room when you retire to consider this matter. If you have some views and find that you are wrong and somebody else is right, don't be embarrassed about changing your opinion. We are not engaging in a popularity contest here. But remember each of you has to decide the case for yourself. A verdict of guilty or not guilty to be acceptable must be unanimous.

If you desire any of the exhibits, those will be sent to you in the jury room upon request. I will have furnished to you, immediately, copies of the Spanish letter and the English translations. If you want any of the testimony that has been allowed in evidence read to you, that can be done also.

Please do not communicate with anyone concerning your deliberations about this case except in a writing signed by your foreman, the gentleman who sits in seat number one. And he will be provided with a pencil and paper for that purpose.

I would like to take a moment to talk to the lawyers at the side bar. They may wish to call to my

1
2 attention some matter that I may have overlooked or
3 where I may have misspoken, and I will ask you to
4 relax for a moment while I talk to them.

5 (At the side bar.)

6 THE COURT: Are there any exceptions
7 or requests on the part of the government?

8 MR. HANDAL: Nothing, your Honor.

9 THE COURT: Are there any exceptions
10 or requests on the part of the defendant?

11 MR. LIPSON: I am sure it was a
12 misspoken word. I think your Honor in speaking of
13 what constitutes a threat said "so equivocal" rather
14 than "unequivocal." That's how I heard it back where
15 I was sitting. I know that is not what was intended.

16 I know what your Honor intended from our
17 discussion yesterday. I think the word that came out
18 was equivocal. Perhaps the court reporter could assist us.

19 THE COURT: I don't really see how it
20 could possibly be that I said equivocal and
21 unconditional.

22 What do you want me to do? I think it
23 was stated exactly as I have it written here, "The threat
24 must be on its face and in the circumstances in which
25 it is made so unequivocal, unconditional and specific as to

1 convey a gravity of purpose and apparent intent of
2 execution."

3
4 Do you want me to repeat it?

5 MR. LIPSON: I heard it different and the
6 people at the defense table heard it differently.

7 THE COURT : Is that all?

8 MR. LIPSON: I will except insofar
9 as your Honor refused to charge as in my requests to
10 charge.

11 THE COURT: Which request do you refer to
12 now, Mr. Lipson?

13 MR. LIPSON: Your Honor virtually refused
14 to give any of my requests with the exception of this
15 language taken from my requests.

16 THE COURT: This is not the time to
17 be ambiguous about your requests. Anything that needs
18 correction should be corrected now and it is your
19 function not to rely on generalia but to be specific.
20 If you have a specific request, you call it to
21 my attention.

22 MR. LIPSON: I identified specific requests
23 to charge.

24 THE COURT: That will not do. Either you
25 give me a specific request or else you will be barred.

MR. LIPSON: Directing my attention to request number seven, I specifically asked that your Honor charge that the jury be instructed that the jury must find beyond a reasonable doubt there was a true threat to kidnap or physically injure Judge Weinfeld. Your Honor refused to use the term, "A true threat."

I requested that your Honor state that a true threat occurs only when it communicates an unequivocal, unconditional and specific expression of an intention immediately to kidnap or inflict bodily injury.

Your Honor gave that with the exception of the requirement of "immediately."

I requested that, your Honor charge to execute a true threat a communication must convey a threat which is so unambiguous, a phrase which your Honor refused to use, and of such immediacy that it convincingly expresses an intention to carry it out.

Again I included the phrase requiring that it be an imminent prospect of execution.

I asked your Honor to make clear to the jury that the fact that a statement shocked, appalled or disgusted did not bring it within the meaning of a threat.

1
2 In my request number eight, unless your
3 Honor wishes, I will not read it in its entirety but
4 ask it be incorporated in the record as I have submitted
5 this.

6 THE COURT: That part of request number
7 eight was omitted from the charge as given.

8 MR. LIPSON: I ask that your Honor state
9 that every person has a right as an individual citizen
10 to communicate with a federal judge -- with a public
11 official, including a federal judge, such as Judge
12 Weinfeld, that such communications might call attention
13 to what the writer with or without justification would
14 be improper or unlawful conduct on the official's part
15 and that it might express dissatisfaction with the
16 official's actions without violating the law.

17 I ask that your Honor charge that such
18 communications may without violating the law contain a
19 threat to seek the official's removal from office
20 regardless whether there were reasonable grounds for
21 believing he had acted improperly and that all persons
22 might make such communication.

23 I ask your Honor to include that the
24 language which one may use in such communications may
25 be vehement, caustic, unpleasantly sharp, vituperative,

1 abusive, exaggerated or inexact without violating the law.
2
3 If the statement or letter here was merely a crude,
4 offensive, exaggerated method of stating political
5 or personal opposition to Judge Weinfeld or dissatisfaction
6 with Judge Weinfeld or threatening in a dramatic fashion
7 the writer's intention to seek his removal from the
8 bench, you may not find that a true threat to commit bodily
9 harm or kidnap was intended and you must acquit the
10 defendant.

11 My request number nine asks the jury be told
12 specifically if they find that the letter was
13 ambiguous, that is, that it is susceptible of two
14 meanings, one threatening and the other non-threatening,
15 they must acquit the defendant.

16 May I have just one moment, your Honor?

17 I think your Honor covered my request on
18 the third element of intent.

19 My request number eleven asks that your
20 Honor specifically instruct the jury to examine the
21 letter in its full context -- I think your Honor did.
22 cover that. I will withdraw that objection.

23 I have nothing further.

24 THE COURT: Except as to the extent already
25 charged, I decline to charge in the words requested. I will,

2 however, repeat to the jury my statements in regard to the
3 second element so there can't be any reasonable
4 apprehension that I failed to call attention to the
5 fact that the threat must be unequivocal.

6 MR. HANDAL: Is it correct that you will
7 repeat the jury charge on the second element?

8 THE COURT : No.

9 I am just going to repeat that part of
10 it that has to do about it as you will hear.

11 If there is anything else you want me
12 to submit, you may call it to my attention.

13 (In open court.)

14 THE COURT: Ladies and gentlemen, a
15 question has arisen as to whether or not I misspoke
16 in reading my notes, so I will reread my notes.

17 The reading was not complained of but one
18 of the lawyers thought I had misspoken in my reading.
19 So I will give this information to you again.

20 The government must prove accordingly that
21 the defendant intended to and did communicate a threat
22 of injury, one which could reasonably induce apprehension
23 of bodily harm. It is the utterance which the statute
24 makes criminal, not the specific intent to carry out
25 the threat. It is not necessary for the government to

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2 prove that the defendant had a specific intent or a
3 present ability to carry out this threat. A person
4 making a statement that one would reasonably be understood
5 as a threat -- let me go back -- a person making a
6 statement that would reasonably be understood as the
7 threat of injury, one which could reasonably induce
8 apprehension of bodily harm, is guilty of a violation of
9 the statute as long as that person intended to make
10 the statement and knew the meaning of the words used.
11 The threat must on its face and in the circumstances
12 in which it is made be so unequivocal, unconditional
13 and specific as to convey a gravity of purpose and an
14 apparent intent of execution.

15 I believe that that completes the matter.

16 Will you swear the marshals.

17 (The marshals were duly sworn.)

18 THE COURT: Mr. Croom, you may go out
19 with your jurors now and deliberate on the matter.

20 Before you do, I would like to have handed to you so you
21 can distribute to your jurors, each of you, a Xerox...
22 copy of the letter in Spanish and the English translation
23 as given by the government witness in this matter.

24 A JUROR: May I have a copy of the
25 indictment, too?

THE COURT: Yes, I will furnish you with a copy of the indictment.

Did you want the typewritten copy sent in also?

MR. HANDAL: It might be easier to read.

THE COURT: Make a copy and we will send it in to the jury.

(At 3:10 P.M., the jury retired to deliberate upon a verdict.)

THE COURT: Is this what you are talking about, 2-A?

MS. HYNES: Yes. The original is 2 and the typewritten was marked 2-A.

MR. LIPSON: 2-A is going in rather than 2 or in addition to 2?

THE COURT: In addition to 2. The question was raised one was punctuated and the other is not and both sides seemed to want an unpunctuated, typewritten copy for the jury's use. That is satisfactory, as I understand it, is that correct?

MR. LIPSON: Yes.

THE COURT: Is that correct, Mr. Handal?

MR. HANDAL: Yes, your Honor.

THE COURT: Give that to them.

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2 (Government's Exhibit 2-A received in
*** 3 evidence.)

4 THE COURT: We will stand in recess in
5 the meantime.

6 (Recess taken.)

7 (In open court, 3:15 P.M.)

8 THE COURT: I have a note from the jury
9 which says, "Does 'threaten to injure' necessarily mean
10 to do bodily injury? Could it include mental
11 anguish?"

12 How do you answer that, Mr. Handal?

13 MR. HANDAL: Does threat to injure --

14 THE COURT: Threaten to injure necessarily
15 mean to do bodily injury.

16 MR. HANDAL: Or could it mean mental
17 anguish?

18 THE COURT: What's that? I don't hear
19 what you are saying.

20 MR. HANDAL: Were they asking or could it
21 mean mental anguish?

22 THE COURT: Yes.

23 MR. HANDAL: I would think it could in
24 the sense that if the defendant's intention here was to
25 cause the victim mental anguish, that would come within

2 the statute's prescription of threats.

3 THE COURT: What do you say, Mr. Lipson?

4 MR. LIPSON: I disagree. I think that
5 the statute must be construed as applying only to
6 threats to do physical injury.

7 THE COURT: The statute uses the words,
8 "Containing any threats to injure the person." How
9 can you injure a person with mental anguish?

10 MR. HANDAL: If the threat that is
11 communicated reasonably puts the defendant -- the
12 victim in fear --

13 THE COURT: Of what?

14 MR. HANDAL: In fear of injury.

15 THE COURT: In fear of injury to his
16 person. Plainly, it doesn't mean bodily injury. It
17 means an apprehension of injury to the man's person. Isn't
18 that correct?

19 MR. HANDAL: Yes, but it seems to me that
20 that is the mental anguish factor that the jury is
21 referring to.

22 THE COURT: It doesn't seem to me that way.
23 Do you want to check it or do you want me to have
24 the jury in?

25 MR. HANDAL: May we check that, your
Honor?

THE COURT: Go right ahead.

(Pause.)

THE COURT: Mr. Lipson, I suppose you would be satisfied if I informed the jury that "threat" means fear or apprehension of injury to the person of the addressee, is that correct?

MR. LIPSON: "Threat" means --

THE COURT: Don't give me a rabbinical statment. You either agree with me or disagree.

MR. LIPSON: I disagree.

THE COURT: The best way to create confusion is to have two people talk at cross purposes.

MR. LIPSON: May I state on the record why I disagree with you?

THE COURT: It is not necessary. I haven't done anything about it yet. When I take some action, you can put all your statements on the record.

MR. HANDAL: Your Honor, may I use the phone in your robing room?

THE COURT: Yes, go ahead.

(Pause.)

THE COURT: Will you gentlemen look at this.

MR. LIPSON: Do you want me to comment now?

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2 THE COURT: Not yet, until after you have
3 studied it. I don't want loose talk.

4 THE COURT: That's what you say in your
5 brief, Mr. Handal.

6 MR. HANDAL: Your Honor, I would want to
7 add something to the effect that it doesn't matter whether
8 the defendant intended to do the bodily harm or
9 whether he just intended to cause the mental anguish.
10 Otherwise this is agreeable.

11 THE COURT: Yes, I think that that is
12 appropriate.

13 MR. HANDAL: Because I think that is the
14 question they are asking.

15 (Pause.)

16 (Discussion off the record.)

17 (4:15 P.M., the jury entered the
18 courtroom.)

19 THE COURT: Ladies and gentlemen, you
20 have sent in a note which reads: "Does 'threaten to injure'
21 necessarily mean to do bodily injury? Could it include,
22 mental anguish?"

23 My answer to you is that the statute
24 makes it a criminal offense to address through the mails
25 to another person a communication containing any threat

2 to injure the person of the addressee.

3 Now, "threat" as used in that statute is
4 a threat to injure the person bodily of the one to whom
5 the letter is addressed. A statement which could
6 reasonably induce apprehension or fear of bodily harm
7 is the threat which the statute refers to. It is not
8 necessary that bodily harm should follow. It is a
9 statement which could reasonably induce apprehension,
10 which is a mental state, or fear, a mental concern,
11 of bodily harm, which is the threat that the statute
12 refers to. It does not matter whether the defendant
13 intended to commit the bodily injury. It is enough if
14 he intended to cause the mental anguish flowing from a
15 threatened bodily injury to the person to whom the
16 letter was sent.

17 Is that explanation any clearer to you?

18 THE JURORS: Yes, your Honor.

19 THE COURT: Mr. Croom, you may retire with
20 your jurors.

21 (At 4:20 P.M., the jury retired
22 to continue deliberating upon a verdict.)

23 MR. LIPSON: Your Honor, may I state
24 my objection to the manner in which your Honor answered
25 the question?

2 I believe that the response which should
3 have been given to that question is that the threat
4 which the statute punishes is unequivocal, unconditional
5 and specific expression of an intention to inflict bodily
6 injury, that anything beyond that unnecessarily confuses
7 the jury and misleads them.

8 THE COURT: The jury note is marked
9 as Court's Exhibit 1.

10 ***

(Court's Exhibit 1 marked.)

11 (At 5:00 P.M., the jury returned to
12 the courtroom.)

13 THE COURT: Ladies and gentlemen, I have
14 your note here. It says, "It does not appear that we can
15 reach a unanimous opinion."

16 I want to call your attention to the
17 fact that you have not been deliberating for a very
18 great length of time as yet. This jury started its
19 deliberations at ten minutes past three. It is only five
20 o'clock at the present time, and that is hardly enough
21 time for me to say that you are in irreconcilable conflict.
22 The fact that there are several opinions or two opinions
23 or more than one opinion, whichever the case may be, is
24 merely indicative of a lively interest in the facts and
25 the necessity for each of you to discuss the case and your

1 differences in an endeavor to see whether you can't
2 reasonably reconcile them. Life is a series of
3 differences and people do accommodate their differences
4 to reason when discussion is had.
5

6 So that as of this time, this case is
7 not in the posture where I would feel that you have
8 reasonably exhausted the opportunity that every jury
9 has to endeavor to reconcile your views with one another
10 and reach a result.

11 The case is a relatively simple one and
12 it doesn't invoke large problems of philosophy or
13 economics or otherwise. It's based on a simple set
14 of facts and the outline of the law I think has been
15 given to you with sufficient clarity so that there should
16 be no misunderstanding, and the rest of it depends
17 entirely on your appraisal of what the letter says.

18 In essence, that's what it's all about.
19 You didn't have in this case any large problems of the
20 credibility of witnesses. You had an explanation that
21 radiated around the letter and the purpose of the
22 letter in the setting in which the letter was sent.
23 You had a legal proceeding of fifteen years ago and
24 you had the defendant in a different setting many
25 years later. What happened in between time was not

1 explained to you other than you know that fifteen
2 years ago there was a two-year sentence for some
3 reason. Then you had the defendant in the posture in which
4 the facts were explained to you and then he arrived at
5 Riker's Island on the 23rd and he wrote a letter on
6 the 25th of February which was mailed, I believe, a
7 day or so -- around that time. I leave it to you when
8 it was mailed. He was released from custody on the
9 28th. The letter actually, whenever it was mailed,
10 arrived on the 2nd of March and from there on everything
11 is physical and ought to be the subject of something
12 that you can understand.
13

14 By giving you this resume, I am not
15 intending that you should accept my recollection of
16 what the facts were because I have no function with
17 respect to the facts. The function is entirely yours.
18 My function only is to tell you what the law is, and
19 the law, to the extent that you have asked me about
20 it, I tried to convey to you and explain to you as we
21 have gone along.

22 The statute deals with misuse of the mails
23 in a certain connection. The question put to you is
24 were the mails misused. I suggest to you that you
25 should spend more time deliberating on this case.

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You may go out.

Just a minute, ladies and gentlemen, I have a note I may have to react to. Send your note up here.

MR. LIPSON: There are quite a few things in here.

THE COURT: If there are any, I may have to continue my statement. You had better come up and tell me about them instead of waiting until the jury goes out.

(At the side bar.)

MR. LIPSON: Your Honor at the beginning of your remarks spoke of the importance of reconciling differences. I think that is a misleading impression of the jury deliberation process and that there should be an additional statement that by saying that you are not suggesting that any juror should surrender a conscientious belief.

THE COURT: For God's sake.

MR. LIPSON: Let me go on, your Honor.

I object to your Honor's emphasis on the simplicity of the case. I don't believe it is as simple as your Honor is suggesting. I object to the manner in which the evidence was marshaled, specifically to

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your Honor's statement after setting forth the facts that everything after that is physical. I point to the fact the question before this jury is the question of intention and your Honor's statement is misleading in that regard.

Also your Honor said that the question before you is whether the mails were misused. I think that is a gross oversimplification of the question before the jury because misuse of the mails is an element here but the jury must find many additional factors, specifically, a threat of bodily injury. For those reasons, I object to your Honor's statement.

(In open court.)

THE COURT: Ladies and gentlemen, I have been advised by counsel that you may have misunderstood what I had to say and I will make it -- make what I think is absolutely clear even clearer than absolutely clear.

Your conscientious beliefs and personal decisions are not to be surrendered by any reconciliation of views, but I know of no way in which two people can get together without reconciling views after discussion. You may ultimately wind up in irreconcilable conflict, but after discussing your respective views one may come to the view that the other is right or vice-versa. That's

2 what reconciling views is. It means nothing more than
3 that.

4 The intention with which this letter
5 was written is of course central to what you have to
6 decide, and that intention is to be gleaned from all of
7 the evidence in the case as you have heard it and your
8 appraisal of that evidence and the facts and
9 circumstances involved. And when I spoke of misuse
10 of the mails, of course I was talking about the use
11 of the mails to convey a threat of bodily injury.
12 That is the misuse that's involved here and not any other
13 that could be conjured up in anybody's imagination.

14 You may go out.

15 (At 5:13, the jury retired to continue
16 deliberating upon a verdict.)

17 (At 5:25 P.M., the jury returned to
18 the courtroom.)

19 THE COURT: Mr. Croom, has the jury
20 agreed upon a verdict?

21 THE FOREMAN: Yes.

22 THE COURT: How do you find, Mr. Croom?

23 THE FOREMAN: Guilty.

24 THE COURT: Ladies and gentlemen, your
25 verdict at it stands recorded is you say you find the